No. 13,226

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,	*Appellant,*
vs.	
JOHN PHILLIP WHITE,	*Appellee.*

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

The statement of the case on pages 1 to 3 of appellant's opening brief is incomplete in several material respects. The salient facts, taken from the findings of fact of the District Court, are as follows:

This is an action brought pursuant to the Federal Tort Claims Act for personal injuries sustained by appellee John Phillip White on November 22, 1946, at Camp Beale, Marysville, California (Tr. p. 62.) Camp Beale was an Army base owned and operated by the Government (Tr. p. 62). At the time of the accident, and prior thereto, White was an employee of Mars Metal Company of San Francisco (Tr. p. 63). Pursuant to invitation from the War Depart-

ment, Mars Metal Company had entered into a contract with the Government for the purchase of nonferrous scrap metal located on the firing ranges (Tr. p. 63) at a specific price. White sustained his injuries while collecting scrap metal as an employee of Mars Metal Company pursuant to the aforesaid contract (Tr. pp. 63-64). Thus, White was a business invitee working on land owned and operated by the Government pursuant to a contract for the mutual benefit of Mars Metal Company, White's employer, and the Government.

Prior to White's entry on the strafing range where the accident occurred, the Government knew that there was a strong possibility that unexploded shells or duds existed on the strafing range where the accident occurred and knew that the presence of such shells or duds was a condition of extreme danger to any person entering on said range (Tr. p. 64). In fact, one month before the accident, Captain Robert Sumner Jones, the Post Range Officer in charge, had conducted a survey of the Camp Beale firing ranges, and on the basis of his survey, had recommended that de-dudding operations be undertaken (Tr. p. 64). This recommendation was rejected because of the expense involved (Tr. p. 64). The strafing range at the time of the accident was grass covered and visual inspection alone could not detect the presence of hidden duds (Tr. p. 65). Although electrical and other scientific detecting devices were known and available to the Government, they were not used because of the expense thereof (Tr. p. 65).

Not only did the Government fail to provide White with a reasonably safe place in which to perform his work, but the Government also failed and neglected to warn White of the known danger he was likely to encounter (Tr. p. 65). In fact, White was not even warned of the findings made by Captain Jones' survey nor the fact that electrical and scientific detecting devices had not been used (Tr. pp. 65-66).

As a matter of fact, the Government actually represented to White that the strafing area was a safe place on which to work (Tr. p. 66). The sergeant in charge of the strafing range under the Post Range Officer, Sergeant Hodges, actually told White prior to his entry that the strafing range was in a safe condition except for a certain marked dud which he pointed out to White (Tr. p. 66). He told White that the range had not been used for some time and he specifically showed White a solid iron 37mm. non-explosive anti-tank projectile and advised White that he was likely to find many such projectiles on the range (Tr. p. 66). Sergeant Hodges knew that Army personnel was assisting White, but he gave no warning to White other than to admonish White to instruct the personnel to stay away from the *marked* dud (Tr. p. 67).

On November 22, 1946, White and his helpers were engaged in collecting cartridges from the strafing range (Tr. p. 67). While so engaged, one of White's helpers, Private Lang, an off-duty Camp Beale army private, picked up what appeared to be one of the

solid iron 37mm. anti-tank projectiles and asked White whether he was interested in the same (Tr. p. 67). Almost simultaneously Lang pitched or handed the projectile to White, who dropped the same (Tr. p. 67). The projectile was in White's hand but a fraction of a second (Tr. p. 67). He did not have time to grasp or inspect it (Tr. p. 67). The projectile exploded causing injury to Private Lang and to White (Tr. p. 67). The projectile which exploded was apparently a 37mm. anti-personnel projectile with an explosive warhead similar in appearance to the non-explosive 37mm. iron anti-tank projectile shown to White by Sergeant Hodges (Tr. pp. 67-68).

As a consequence of the explosion, White sustained grievous personal injuries of a permanent character requiring recurrent hospitalization and surgery (Tr. pp. 69-70). Appellant offered no contrary medical evidence in the trial court, nor does appellant contest the propriety of the $55,081.19 judgment on this appeal.

ARGUMENT.

We will now answer the specifications of error on which appellant relies:

(1) THE GOVERNMENT WAS GUILTY OF NEGLIGENCE TO WHITE, A BUSINESS INVITEE.

On page 23 of its brief, appellant corrects a fundamental error which it made in the trial court, and now concedes that White was a business invitee, and not

a mere licensee. By so conceding, we assume that the parties are now in agreement as to the basic applicable law governing the Government's duties as a land owner to a business invitee under the Federal Tort Claims Act, to-wit:

(a) The liability of the Government is the same as that of a private individual under applicable California law (28 U.S.C.A. Sec. 1346(b)).*

(b) The Government was obligated to provide White, a business invitee, with a reasonably safe place to perform the contract with the Government (*Freeman v. Nickerson,* 77 Cal. App. (2d) 40).

(c) The Government was obligated to inspect the strafing range for latent or hidden dangers and to remove the same, or to warn White thereof (*Hinds v. Wheadon,* 19 Cal. (2d) 458).

(d) All of these duties had to be fulfilled with the high degree of care commensurate with the extreme danger involved (*Rudd v. Byrnes,* 156 Cal. 636, 640).

(e) In addition to liability for negligence under the foregoing rules, the Government could not represent something as safe which in fact was dangerous to life and limb (*Humphrey v. Star Petroleum Co.,* 110 Cal. App. 15).

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*Pertinent provisions of the Federal Tort Claims Act are printed in the appendix, infra.

Thus, in respect to the application of the Federal Tort Claims Act, this court in the case of *Johnson v. United States,* 170 Fed. (2d) 767 (9th Circ.), said:

> "The Act is a blanket renunciation of Government immunity to suit in the case of certain types of claims specifically enumerated therein and reflects a Congressional intent and purpose so definite and certain that we need not resort to interpretation of various prior statutes which affected piecemeal release of Government immunity from private suits * * * The policy which we think underlies and pervades the whole Act lends weight to the view that a claim of the general character of the one here involved is properly within the orbit of the Act * * *"
>
> (p. 769.)

Similarly, the Supreme Court, in *United States v. Aetna Casualty & Insurance Co.,* 338 U.S. 366, 94 L. Ed. 171, 70 Sup. Court 207, said:

> "In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in Anderson v. John L. Hayes Constr. Co., 243 N.Y. 140, 147, 153 N.E. 28: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' "
>
> (p. 383.)

A good illustration of the duties of a landowner to a business invitee is found in *Freeman v. Nickerson,* 77 Cal. App. (2d) 40, supra, where the court held liable the owner of an apartment house for injury to a contractor's wife, who threw wood dust down an incinerator chute and suffered burns from the resulting explosion. The court said:

> "Both respondents were, of course, business visitors or invitees on the premises of appellants, and, as the owners of the property, appellants owed respondents the duty to afford them reasonably safe premises and conditions upon which to carry out the purpose of the 'invitation.' (*Dobbie v. Pacific Gas & Electric Co.,* 95 Cal. App. 781; *Sawyer v. Hooper,* 79 Cal. App. 395; *Hinds v. Wheadon,* 19 Cal. (2d) 458)."
>
> (p. 47.)

In *Hinds v. Wheadon,* 19 Cal. (2d) 458, supra, which involved death from the explosion of a dehydrator tank during welding operations, the court stated the rule in this way:

> "The defendants had an obligation, which they do not dispute, to exercise reasonable care in order to make the dehydrator tank safe for the welding operation which Hinds was ordered to perform. Such a duty of care was required because Hinds was invited upon the premises as a business visitor to work upon the tank."
>
> (p. 460.)

In respect to the duty to warn the business invitee, the court in *Freeman v. Nickerson,* supra, expressed this obligation as follows:

> "In the fulfillment of such responsibility, it is the duty of the owner to advise the invitee of hidden dangers known to such owner, in instances where such dangers are not reasonably apparent to the invitee. (*Riley v. Berkeley Motors, Inc.,* 1 Cal. App. (2d) 217; *Lejeune v. General Petroleum Corp.,* 128 Cal. App. 404.)"
>
> (p. 47.)

In *Hinds v. Wheadon,* supra, the rule was expressed as follows:

> "The invitor's responsibility is not absolute but he is 'required to use ordinary care for the safety of the persons he invites to come upon the premises. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger.' (*Shanley v. American Olive Co.,* 185 Cal. 552.)"
>
> (pp. 460-461.)

As stated above, the landowner is held to an extraordinarily high degree of care commensurate with the danger involved. The rule has been expressed in the case of *Been v. Lummus Co.,* 76 Cal. App. (2d) 288, as follows:

> "When human life is at stake the rule of due care and diligence requires that *without regard to difficulties or expense* every precaution be taken reasonably to assure the safety and security of any person lawfully coming into the immediate

> proximity of the dangerous agency or device which is a peril to others."
> (p. 293.)

Now let us see how appellant seeks to avoid these applicable rules of law:

First, appellant argues that the District Court erred in finding that the Government knew or should have known, of the dangers likely to be encountered, and therefore appellant argues that the Government had no duty to warn White (Br. pp. 26-27). The finding of the District Court is amply supported by the record. The only evidence relied on by appellant is a certain unauthenticated statement by Sergeant Hodges (Br. p. 27) which appellant now concedes was not admitted in evidence (Supp. Br. p. 2). Captain Robert S. Jones, the Post Range Officer, knew that mere ground vibration may detonate a dud (Tr. p. 297) and that the Army considers de-dudding an extra-hazardous operation even for experts (Tr. p. 287). He made a detailed survey of the firing ranges just one month before the accident (Tr. p. 254), and as a result thereof he "assumed that there may be duds" on the strafing range (Tr. p. 270). He asked the Deputy Commander to send out special demolition squads (Tr. pp. 288-289). This recommendation was ignored *because of the cost involved** (Tr. p. 289).

Inspection of the strafing range immediately after the accident revealed the presence on this strafing range of a 61mm. mortar shell (Pl. Ex. 13), five 37mm.

*All emphasis is the author's, unless otherwise indicated.

duds, one 75mm. dud, one small practice bomb, and one 61mm. mortar dud (Pl. Ex. 14). It was a 37mm. dud which caused the accident (Tr. p. 121). Thus, there is ample evidence that the Government should have known of the ultra-hazardous condition of the strafing range.

This was further demonstrated by the admissions made by Captain Jones in a conversation with one of the owners of the Mars Metal Company shortly after the accident. This owner testified as follows:

> "Now, at that point Captain Jones looked over his records and he became very angry and very agitated because he said to the third captain—not Captain Pitre, but to the third captain—that the last report he had was that this firing range was a safe range, that it had been decontaminated.
>
> 'Now,' he says, 'obviously there were marked duds on this field and some that were not marked, and obviously the field was not decontaminated,' and he was not so notified and that there had been an infraction of army rules."
>
> (Tr. p. 161.)

Appellant complains that there is no evidence that the *particular dud* which caused the injury should have been discovered (Br. p. 27). Of course, the law does not impose such an intolerable burden on an injured party. In any event, the evidence here showed that this strafing range was grass covered so that the visual inspection used was insufficient to locate hidden duds (Tr. pp. 279-280), and that scientific electrical

devices, although available, were not utilized *solely because of the expense involved* (Tr. pp. 262-263).

Plaintiff cites (Br. p. 27) in this connection *Girvetz v. The Boys' Market,* 91 Cal. App. (2d) 827, where plaintiff slipped on a banana which had been on defendant's floor, unknown to defendant, for a minute and a half. This case is totally inapplicable to the case at bar, where the army installation was under the exclusive control of the Army (Tr. p. 62). Furthermore, the dud which caused the accident must have been on the strafing range for more than one year (Tr. p. 105).

Second, appellant claims that the District Court erred in finding that White was not warned of the dangers likely to be encountered (Br. pp. 23, 24).

The record fully supports this finding. Prior to his entry on the strafing range, Sergeant Hodges merely called White's attention to one *marked* 75mm. artillery shell which he called a "freak" (Tr. p. 197). He told White that the strafing range had not been used for more than one year (Tr. pp. 104-105), and that this range had theretofore been decontaminated and rendered safe (Tr. p. 107). He showed White a solid iron 37mm. anti-tank projectile and advised him that he would find many on the strafing range (Tr. p. 105). This was a dangerous representation because the projectile which caused the explosion appeared to be a solid iron one, whereas it actually was a 37mm. anti-personnel projectile with an explosive warhead (Tr. p. 121). On a second visit before the accident, Hodges again told White and his fiancee that the strafing range

was perfectly safe, and he permitted both of them to wander over the range on foot (Tr. pp. 109; 213).

Captain Charles D. Pitre, the contracting officer, likewise failed to warn White of danger on the strafing range (Tr. pp. 110-111).

White had told Captain Jones, the Post Range Officer, that he was confining his efforts to the *strafing range* where the nonferrous metal was located, as distinguished from the artillery ranges (Tr. p. 113). Captain Jones, himself, testified that White "rather clearly" told him that he was interested in non-ferrous metal only and not in the ferrous metals found in the artillery impact areas (Tr. pp. 235; 256-257). Jones called White's attention to the *marked dud* on the strafing range, but said nothing about any other potential danger (Tr. pp. 113; 195-196). *Jones conceded that his warning to White was confined to the artillery impact areas* (Tr. p. 265; Def. Ex. G). In order that there be absolutely no confusion in what Jones meant by "artillery impact areas" he was asked to mark these areas "A" and "B" on the War Department map (Tr. p. 252; Pl. Ex. 15), and he testified that these ranges were "many miles" from the strafing area, which he had marked "X" (Tr. p. 292).

Jones also failed to warn White in other vital respects. For example, he failed to tell him that there had been no use of scientific electrical or mechanical equipment to locate duds on the strafing range (Tr. p. 278). He did not recall whether he had even told

White of the findings of his October survey (Tr. p. 297).

Appellant refers to certain warning signs posted in the target area (Br. p. 26). The evidence, however, shows that the signs were merely warnings to the *general public* that they were entering upon the firing range area and should stay on the traveled roads (Tr. pp. 266-267). Such signs obviously have nothing whatsoever to do with a business invitee specially invited to enter upon a particular range.

Third, appellant assumes that the danger was obvious to White because he knew of the presence of *one marked artillery dud* on the strafing range (Br. p. 24). This is a false assumption. We have already seen that this was a virtual trap, because the particular dud was called a "freak" and the range was represented as being otherwise free from danger. In response to the warning of the *marked* dud, the record shows that White was meticulously careful in protecting his helpers and himself from this danger (Tr. p. 118). He went to great lengths in this respect. White said:

> "Originally there was a stick with a rag on it and I didn't want any trouble, and so I put some rocks which were available at a radius of 20 to 25 feet and told the men, 'Don't even go inside the radius' " (Tr. p. 118).

The cases cited by appellant on pages 24 and 26 of its brief state correct principles of law in respect to known or obvious dangers. We have no quarrel with

these cases, but they clearly constitute no authority here where the danger was hidden and where White in fact was assured that the area in which he was to work was perfectly safe. Thus, in *Blodgett v. Dyas,* 4 Cal. (2d) 511, the plaintiff deliberately stepped into a stairway clearly in front of her very eyes. In *Mautino v. Sutter Hospital Association,* 211 Cal. 556, where a nurse slipped on a hospital floor, judgment for plaintiff had to be reversed because the instructions in effect held the defendant to be an insurer and held that contributory negligence should be disregarded. In *Ambrose v. Allen,* 113 Cal. App. 107, a painting contractor who entered a building under construction fell when he deliberately stepped upon a joist which did not have sufficient support under it. In *Royal Insurance Co. v. Mazzei,* 50 Cal. App. (2d) 549, a truck was deliberately driven into defendant's electric wires, which were exposed and obvious to the driver. In *Dingman v. Mattock,* 15 Cal. (2d) 622, a plaintiff sub-contractor with as much knowledge as defendant intentionally stepped upon a plank across a stairwell in a building under construction, which plank broke. In *Jones v. Bridges,* 38 Cal. App. (2d) 341, a customer fell down a stairway leading to a lavatory in a cafe, which stairway and the condition thereof were obvious to the eye. In *Brown v. San Francisco Ball Club,* 99 Cal. App. (2d) 484, a patron at a baseball game who chose to sit outside the protective screen was hit by a baseball. In *Shanley v. American Olive Company,* 185 Cal. 552, a switchman on a train was injured when he deliberately remained

on the side of a car being switched adjacent to defendant's building, the proximity of which was obvious and apparent to him.

These cases are certainly no authority in a situation such as the case at bar, where the Government not only failed to warn plaintiff of hidden dangers known to it or to provide him with a safe place to work, but actually represented something as safe which in fact was dangerous to life and limb.

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(2) APPELLEE WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

On pages 7 to 9 of its brief, appellant argues that White is chargeable with contributory negligence because one of his helpers, Private Lang, pitched or handed to White the dud which exploded. The entire argument is based on a false premise, to-wit, that Lang was the employee of White (Br. p. 12). The contract which White was carrying out was a contract between the Government and Mars Metal Company, White's employer (P. Ex. 1; Tr. pp. 98-99). White was a salesman and buyer for Mars Metal Company (Tr. p. 98). At the time of the accident he was paid a straight salary of $250.00 per month (Tr. p. 178) and he had no financial interest in the contract (Tr. p. 169). He merely engaged Lang and other off-duty personnel, with the consent of their superior officers, to help him collect the metal for Mars Metal Company (Tr. p. 64). Lang and the other helpers were there-

fore sub-agents of White and not his employees. In California, the sub-agent (Lang) represents the principal (Mars Metal Co.) and not the original agent (White). White, therefore, was not responsible for Lang's acts:

Cal. Civil Code, Sec. 2351;
Barton v. McDermott, 108 Cal. App. 372, 385;
Shannon v. Fleishhacker, 116 Cal. App. 258, 264.

Even were the California rule otherwise, appellant would be in no better position, because there is nothing whatsoever in the record to indicate that Private Lang was negligent.

Appellant's argument is based solely and only on an alleged admission of Lang contained in "Defendant's Exhibit D" (Br. p. 8), but this exhibit, being palpable hearsay, was marked for identification only and excluded from the record (Tr. pp. 296; 306). The gratuitous statements of counsel that Lang was skilled in matters of ammunition and knew of the existence of duds in the strafing range (Br. pp. 7-8) find no support in the record. Actually, Lang did nothing more than pick up what looked like a harmless solid iron 37mm. projectile of the type Sergeant Hodges had said would be found on the strafing range, and hand the same to White (Tr. p. 209). In fact, Sergeant Hodges saw White's helpers, including Lang, on the strafing range, and watched with approval the procedure that was being used (Tr. p. 118). White naturally would assume that what was safe for army per-

sonnel was safe for him. Thus, there is no evidence that either Lang or White was guilty of any negligence, contributory or otherwise.

The trial court's finding that White was not guilty of contributory negligence is therefore fully supported by the record (Tr. p. 69).

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(3) THERE WAS NO INTERVENING CAUSE CUTTING OFF APPELLANT'S LIABILITY TO WHITE.

The District Court found that the act of Lang in handing or tossing the projectile to White was a normal and natural incident to the collection of scrap metal and therefore foreseeable by the Government; hence, Lang's conduct did not in any way constitute an intervening cause relieving the Government of liability to White (Tr. p. 68).

This finding is attacked on pages 9 to 12 of appellant's brief, not on the basis of anything in the record, but rather on certain arbitrary and unfounded assumptions of counsel.

First, it is assumed that Lang was guilty of negligence in that he *knowingly* tossed an unexploded shell to White "with complete disregard for the welfare of himself and his employer" (Br. p. 10). Of course, there is nothing in the record to support such a fantastic claim. We have already seen that Lang merely picked up what appeared to be a harmless solid iron 37mm. projectile of the type Sergeant Hodges said would be found on the strafing range, and handed the

same to White with an inquiry as to whether White was interested therein (Tr. p. 209). White did not have time to grasp the explosive firmly or inspect the same. It was in his hand but a fraction of a second (Tr. pp. 210-211). Lang had no more knowledge of danger than White. His act was free from negligence, and obviously free from any deliberate intent to harm either himself or others.

Even were we to assume that Lang was somehow negligent in failing to detect the danger, nevertheless his act of handing the projectile to White was a natural and foreseeable one, as the trial court found (Tr. p. 68). In the collection of scrap metal, what is more natural or foreseeable than for the helper, untrained in the metal business, to consult from time to time with his foreman as to the kind of scrap metal he wished to collect? The rule of *Northwestern National Insurance Co. v. Rogers Pattern & Aluminum Foundry,* 73 Cal. App. (2d) 442, wherein a hearing was denied by the California Supreme Court, governs such a situation. In that case, the defendants negligently shipped magnesium instead of aluminum castings to North American Co., whose general manager *negligently* immersed the same in sodium nitrate, causing an explosion. The general manager actually saw that the color of some of the castings differed from the color of other castings in the shipment and observed the difference in the weight of the castings from those previously received. Concerning a claim that the negligent acts of the manager constituted an

independent intervening cause cutting off defendants' liability, the court said:

> "This proposition is untenable since the law is settled in California that an intervening act of a third person, negligent in itself, is not a superseding cause of injury to another which the actor's negligent conduct is a substantial factor in bringing about, if (1) the actor at the time of his negligent conduct should have realized that a third person might so act, or (2) a reasonably prudent man knowing the existing situation when the act of the third person was done would not regard it as *highly extraordinary* that the third person should so act. (*Mosley v. Arden Farms Co.,* 26 Cal. (2d) 213, 219. See, also, *Lacy v. Pacific Gas & Electric Co.,* 220 Cal. 97, 98; *Herron v. Smith Brothers, Inc.,* 116 Cal. App. 518, 521; *Restatement of the Law,* vol. II, Torts (Negligence), p. 1196, § 447.)"
>
> (p. 444.)

The present case is far stronger than the *Northwestern National Insurance* case because there the court *assumed* that the general manager, or intervening party, was negligent. Certainly no such assumption can be made in regard to Private Lang's conduct. And his conduct was certainly not "highly extraordinary."

Second, appellant assumes that the act of Lang and not the prior negligence of appellant, is the sole proximate cause of White's injuries (Br. pp. 10-11). This is not the law. The basic and fundamental negligence in this case is the failure of the Government to

maintain a safe place in which White could carry out the contract and to take such precautions as necessary to find and remove duds from the place where he was to work. This negligence continued prior to the time White and his fellow-workers entered the range until the very moment of explosion. Even had Lang been proved negligent, nevertheless such negligence would merely have concurred with the basic original negligence of the Government to cause the explosion. The two concurring acts, under California law, would then constitute the proximate cause of the injury. The rule is stated in *Rae v. California Equipment Co.,* 12 Cal. (2d) 563, quoting from *Lacy v. Pac. Gas & Elec. Co.,* 220 Cal. 97, 98, as follows:

> "The authorities in this state hold that where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury."
>
> (p. 570.)

This rule is clearly illustrated by one of the very cases cited by appellant (Br. p. 11), *Stewart v. United States,* 186 Fed. (2d) 627 (7th Circ.). In that case some children were injured by the explosion of a smoke grenade which had been removed from Fort Sheridan, Illinois, by three high school boys who scaled a wire fence and trespassed on the reservation. The court first distinguished and disapproved of the case of *Schmidt v. United States,* 179 Fed. (2d) 724

(10th Circ.), also cited by appellant (Br. p. 11), wherein the father of children employed by a contractor to remove hay from the military reservation at Fort Riley, Kansas, found some bazooka shells which he thought were harmless and which he took home with him. The children played with the shells and the injuries followed. The *Stewart* case pointed out that the *Schmidt* case was decided by a divided court under very narrow Kansas law and involved the act of a mature man who committed trespass by removing the shells from the reservation, which acts were unforeseeable, and therefore constituted an intervening cause. The court then stated that under applicable Illinois law, where high explosives are involved, the courts "will not look too narrowly for independent causes intervening between the injury and the original negligence in keeping" (p. 634). The court said:

> "That the Government negligently permitted a situation fraught with great danger is hardly open to doubt, and that the intervening act which it relies upon as an avenue of escape from its negligence might reasonably have been apprehended is also clear. Such being the case, its negligence contributed to the injuries complained of and must be regarded as the proximate cause."
>
> (p. 634.)

Nor is there anything to the contrary in the third and last case cited by appellant (Br. p. 11), *Hauser v. Pacific Gas & Electric Co.*, 133 Cal. App. 222, where the operator of a hay derrick deliberately and knowingly caused the boom thereof to contact defendant's

high tension power line. The case correctly held that *no negligence whatsoever* by defendant was either alleged or proved.

Thus, under no conceivable interpretation could Lang's conduct be held an intervening cause exempting the Government from liability. This was well stated by the trial court as follows:

> "The fact that soldiers employed by plaintiff, himself, participated in the scrap collecting and that one of them handed or tossed the fatal dud to plaintiff is immaterial so far as freeing defendant from liability. Such conduct on the part of the military personnel did not give rise to the status of an intervening cause so as to cut off defendant's liability. The conduct in question was usual and expected under the circumstances and merely made possible the explosion caused by defendant's own negligence in failing to clear the range or, in the alternative, safely marking it for those engaged in collecting scrap. Rae v. California Equipment Co., 12 C. 2d 563. Cf. Stewart v. United States, 186 F. 2d 627."
>
> (Opinion of District Court, Tr. p. 42.)

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(4) WHITE DID NOT ASSUME THE RISK OF THIS EXPLOSION.

The District Court found that White did not assume the risk of the explosion (Tr. p. 69). Appellant claims that the findings are erroneous (Br. pp. 19-22). The basis of this claim is a statement that White must have known of the danger because he was warned of

the same (Br. p. 20). As we have already seen, the evidence is to the direct contrary. Let us now show just how appellant has misinterpreted or misstated the testimony to support this argument:

(a) Appellant says that Sergeant Hodges warned White "of the existence of duds or explosives in the area of the strafing range" (Br. p. 19). This is absolutely untrue. Hodges pointed out one marked 75mm. artillery dud which he called a "freak" because the strafing range was not an area where such shells normally fell (Tr. pp. 107; 197). Hodges represented this range to be otherwise safe and free from duds (Tr. pp. 107; 109; 213). Appellant tries to insinuate that Hodges showed White dangerous explosives likely to be encountered (Br. p. 19), but the only thing shown White was a harmless solid iron 37mm. projectile, which unfortunately resembled the 37mm. anti-personnel projectile which caused the explosion (Tr. pp. 105; 209).

(b) Appellant says that Captain Jones "warned appellee of the possibility of unexploded shells on the ranges" (Br. p. 20). But we have already seen that Jones' warning was confined to the *artillery impact areas* many miles from the strafing range and in which White was not interested (Tr. pp. 256-257; 265; 292). Respecting the *strafing range,* Jones warned of *one marked artillery dud,* but of nothing else (Tr. pp. 113; 195-196.)

(c) Appellant says that Captain Pitre, the contracting officer, warned White of possible danger on the

strafing range, citing defendant's exhibit "I" (Br. p. 20). This exhibit was not admitted in evidence, as appellant now concedes (Supp. Br. p. 2). Actually, the record affirmatively shows that Captain Pitre failed to warn White of any danger on the strafing range (Tr. pp. 110-111).

(d) Appellant says that White himself admitted a knowledge of duds on the strafing range (Br. pp. 20, 21). This fantastic conclusion is drawn by ignoring all of White's trial testimony and actually misquoting from a statement given by White in the Army Hospital five days following the explosion (Def's Ex. A). Appellant quotes White as saying "I knew there were 'duds' out there" (Br. p. 20). What White actually said in this statement was:

> "I explained to the men that I wanted the empty cartridges, that I knew there were *two duds* out there, but to leave them alone, skirt them, * * *"
>
> (Def's Exhibit "A".)

White obviously was referring to *marked* duds which had been pointed out to him, not to *unmarked* duds. As previously pointed out, White took great precautions in avoiding any danger to himself and his helpers from *marked* duds.

(e) Appellant argues that the huge, marked 75mm. artillery dud (the "freak") so resembled the 37mm. anti-personnel dud which exploded as to constitute fair warning to White, because both had "a small piece of gilding metal" on them (Br. p. 21). Appellant

is confused in that the gilding metal was on the non-explosive 37mm. projectiles shown White by Hodges, not on the 75mm. marked dud (Tr. p. 105). Not only is there no evidence whatsoever that the 75mm. dud had any gilding metal on it, but the comparison is otherwise so absurd as to require no further comment.

(f) Appellant again refers to the warning signs allegedly posted at Camp Beale (Br. p. 21). We have already seen however, that these signs were merely warnings to the *general public* that they were entering upon the firing range area and should stay on the traveled roads (Tr. pp. 266-267), and constituted no warning whatsoever to a business invitee.

(g) Appellant places some reliance upon the fact that the contract between White's employer and the Government provided for the sale of scrap metal on a "where is" basis and allowed White's employer to be the sole judge of the areas to be worked (Br. p. 20). Clearly, the mere fact that White's employer undertook under the contract to collect the scrap metal and was given the discretion to determine from what ranges it would gather the metal, did not mean that White's employer had contracted away the duty of due care owed to it and its employees as business invitees.

The question of knowledge and appreciation of danger are matters for the determination of the trial court (*DeGraf v. Anglo California National Bank,* 14 Cal. (2d) 87, 100; *Meindersee v. Meyers,* 188 Cal. 498, 502). The trial court could reach but one possible

conclusion in this case. White was assured that, except for the marked dud pointed out to him, the strafing range was free of explosives and a safe place on which to work. He therefore could not possibly have "assumed the risk" of the existence of a deadly projectile or hazard of which he had no conceivable knowledge. The court in *DeGraf v. Anglo California National Bank,* supra, stated the rule as follows:

> "And before it can be said that one has 'assumed the risk' of a specified hazard, it must be shown that he had knowledge of the condition creating the hazard. One does not assume the risks of danger which he has no reason to anticipate (*Williamson v. Fitzgerald,* 116 Cal. App. 19.)"
>
> (p. 100.)

Similarly, in *Claypool v. United States,* 98 Fed. Supp. 702 (Cal.), a Federal Tort Claims Act case, the court stated:

> "On the question of assumption of risk, it is our view that the risk was a concealed one, and that plaintiff, not knowing of any risk, could not assume one. Further, the language of the brochure, itself, is sufficient to cause those visiting the camp to believe they will be safe in camping out provided they observe the regulations. Were the statements in the brochure not sufficient certainly the information or lack of information given by the Park Rangers in answer to plaintiff's inquiries served to give him a sense of security from danger."
>
> (p. 704.)

The rule is illustrated by several of the very cases cited by appellant (Br. p. 22). Thus, in *Weaver v. Shell Oil Co.,* 34 Cal. App. (2d) 713, plaintiff was held not to have assumed the risk of an explosion of gasoline delivered to an underground tank on his employer's premises where he had no prior knowledge of possible danger therefrom. *Zeisemer v. McCarty,* 71 Cal. App. (2d) 378, held that plaintiff building superintendent did not assume the risk of injury sustained during the delivery of lumber to the project on which he was working where he had no knowledge of any danger. *Hayes v. Richfield Oil Corp.,* 38 Cal. (2d) 375, held that plaintiff patron did not assume the risk of a fall into a hidden grease pit at defendant's service station. *Bazzoli v. Nance's Sanitorium,* 109 Cal. App. (2d) 232, held that a business invitee to defendant's premises did not assume the risk of falling through a defective floor, the danger of which was unknown to plaintiff.

The remaining cases cited by appellant (Br. p. 22) involved fact situations totally inapplicable here. Thus, in *Gleason v. Fire Protection Engineering Co.,* 127 Cal. App. 754, an employee sent to cover a hole in a leaking roof, deliberately grasped a wet and slippery rope, and as a consequence fell through an exposed skylight clearly apparent to his eye. He was properly held to be guilty of contributory negligence as a matter of law. In *Grassie v. American LaFrance Fire Engine Co.,* 95 Cal. App. 384, a guest on a fire engine was properly held to have assumed the risk of in-

juries sustained during a test run where he knew that the engine was going to make a run just as though going to a real fire, and where he also knew the condition of the streets over which the run was to be made. In *Goetz v. Hydraulic Press Brick Co.,* 320 Mo. 580, 9 S.W. (2d) 606, the court correctly held that a miner who saw an open box of dynamite, watched a hot piece of steel strike the wall immediately above it, but nevertheless chose to remain on the premises after he had ample time to leave in safety, assumed the risk of the inevitable explosion which followed.

There is an insinuation or suggestion by appellant that the collection of scrap metal from a strafing range is an ultra-hazardous pursuit, and a business invitee, while so engaged, should not be permitted to recover, regardless of how culpable the land owner's conduct may be (Br. p. 21). This line of reasoning is difficult to understand. If the Government had rendered the strafing range safe by use of proper detecting and de-dudding equipment, the collection of scrap metal from a strafing range would be no more dangerous than the collection of metal from any other location. If the Government had even given White the information it possessed, or had properly warned him, he could have refused to go on the range. But the Government chose to represent something as safe which in fact it knew was highly dangerous, and nevertheless now argues that White "assumed the risk" of the trap into which he was lured.

(5) NEGLIGENCE BY PARTICULAR AGENTS OF THE GOVERNMENT ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT WAS CLEARLY DEMONSTRATED IN THIS CASE.

Appellant advances the novel argument (Br. pp. 12-16) that there can be no liability under the Federal Tort Claims Act unless a *particular* Government employee was shown to have been negligent. This argument is apparently based by appellant on some language in one of the three opinions rendered by a divided court in *Texas City Disaster Litigation,* 197 Fed. (2d) 771 (5th Circ.) and in *Lauterbach v. United States,* 95 Fed. Supp. 479 (Wash.) (Br. p. 13). The *Texas City* litigation involved alleged negligence in executing the Wartime Fertilizer Program, while the *Lauterbach* case involved alleged negligent operation of Bonneville Dam. Neither case was concerned with the duties of a landowner to a business invitee, and since no negligence by *anybody* was found in either case, they throw little, if any, light on the case at bar.

An Army installation such as Camp Beale *must,* of necessity, be operated and maintained by Army personnel. If it is negligently maintained, it must be the negligence of such personnel. Unless the Government shows intervention or control by unauthorized third parties, any other result would be impossible. No such intervention or control was shown in this case. Therefore, the trial court specifically found that all of the acts of negligence, misrepresentation and neglect were acts by agents, servants, and employees of defendant United States of America act-

ing within the course and scope of their employment (Finding XIII, Tr. pp. 68-69).

The law governing such situations under the Federal Tort Claims Act was first enunciated by Chief Judge Magruder in *United States v. Hull,* 195 Fed. (2d) 64 (1st Circ.), where plaintiff sustained injuries due to negligent maintenance of a post office window. The court held (a) that it was unnecessary under the Act for plaintiff to show negligence of a *specific* employee, and (b) the Government may be liable under the Act for nonfeasance as well as misfeasance.

The opinion was followed in *Jackson v. United States,* 196 Fed. (2d) 725 (3rd Circ.), where plaintiff sustained injuries in falling on post office steps. The court said:

> "We think it obvious that the Government can only act through the agency of some human being. The statute in so many words says, in imposing liability, 'personal injury * * * caused by the negligent or wrongful act or omission of any employee of the Government * * *' The maintenance of post office property in an unreasonably dangerous condition is just as much the negligent omission of an employee of the Government as is the failure to heed a stop sign by the driver of a mail truck."
>
> (p. 726.)

In *Blaine v. United States,* 102 Fed. Supp. 161 (Tenn.), where plaintiff fell on a defective sidewalk adjacent to a Government building, the court said:

> "Whether this duty of inspection and maintenance was reposed wholly in the postmaster would not seem to be decisively material. The duty rested somewhere, for the sovereign functions only through agents. Realty is not an active instrumentality, requiring manipulation, but is passive, requiring maintenance, or the lack of it, as the source of misfeasance. For that reason it is difficult, if not impossible, to identify a particular individual as the sole tort feasor."
>
> (p. 165.)

The cases cited by appellant (Br. pp. 14-15) in no way derogate from this rule. In *United States v. Campbell,* 172 Fed. Rep. (2d) 500 (5th Circ.), the plaintiff was negligently hit by a sailor running to catch a train. Since there was no evidence that the sailor was acting under orders at the time, it could not be said he was acting within the scope of his employment. In *United States v. Eleazer,* 177 Fed. (2d) 914 (4th Circ.), plaintiff was injured when an automobile driven by a Marine lieutenant collided with his automobile. At the time, the lieutenant was on his way home for the enjoyment of a deferred leave. The court properly held that the lieutenant was not acting within the scope of his office or employment. In *Denney v. United States,* 185 Fed. (2d) 108 (10th Circ.), the trial court found no negligence by the Government where an exposed shell exploded on an isolated target range on which mature high school boys had trespassed. The boys deliberately caused the shell to explode. The appellate court held that it was

bound by this finding and that, under these circumstances, the mere presence of an unexploded shell on the range or a failure to warn or deactivate the same, was not negligence as a matter of law. The court distinguished the case from the facts in *Beasley v. United States,* 81 Fed. Supp. 518 (So. Car.), which involved injuries through the explosion of projectiles on a military reservation, and in which the court laid down the following rule:

> "If the official in charge of a Government reservation leaves explosives or other dangerous instrumentalities around where the public *visits and is invited,* his employer, the Government, is held liable."
>
> (p. 529.)

In *Madden v. United States,* 76 Fed. Supp. 41 (Fla.), the Government was absolved from liability where a child ran into the side of an Army truck.

So we see that the law does not require the injured party to identify the *particular* negligent agent in the case of negligently maintained or operated property. But even if it did, appellant would be in no better position for the simple reason that White *did identify* every responsible negligent agent: (a) Captain Robert Sumner Jones, the Post Range Officer in charge of the strafing range, who failed to warn White of the impending dangers or to even tell him of the findings of his survey; (b) Sergeant Frank C. Hodges, the Range Sergeant under Jones' supervision, who represented the strafing range to be absolutely safe (the

statement of Hodges on which appellants originally relied and which is referred to on page 15 of appellant's opening brief is now conceded (Supp. Br. p. 2) to have been erroneously admitted in evidence, and therefore constitutes no part of the record); and (c) Captain Charles D. Pitre, the contracting officer, who failed to warn White of *any* danger.

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(6) PROPER DECONTAMINATION OF THE STRAFING RANGE WAS NOT A DISCRETIONARY ACT RELIEVING THE GOVERNMENT OF LIABILITY FOR NEGLIGENCE OR MISREPRESENTATION.

We have already seen that the Government was guilty of many acts of negligence, and even misrepresentation, as to the condition of the strafing range. Appellant argues that the Government is absolved from all liability because the decontamination of the range was a "discretionary function" (28 U.S.C.A. Sec. 2680(a)) within the meaning of the Federal Tort Claims Act (Br. pp. 16-18). In support of this contention, appellant originally relied upon the answers to interrogatories of Captain Pitre (Br. p. 17), but appellant now concedes (Supp. Br. p. 2) that these answers were part of the inadmissible exhibit "I" and states that its argument "stands or falls upon the contents of War Department Circular I-195" (Pl. Ex. 12; Supp. Br. p. 4). Let us accept this challenge and direct our attention to the circular in question.

The circular, as appears in paragraph 1 thereof, relates to the placing of former Army installations in a surplus category for possible release or return to civilian use. It does *not* concern the duties of the responsible officers of an operative Army installation to a business invitee performing a contract with the Government. The trial court recognized this distinction when the circular was first offered in evidence (Tr. pp. 216-217). At that time, counsel for the Government concurred in the court's views and said: "I do not think it is material" (Tr. p. 217).

Even if the circular were material, it has been completely misconstrued by appellant. True, the circular says that it is the obligation of the War Department in the interests of the United States to restore as much land as possible "by locating and removing or neutralizing, so far as practicable, all explosives which remain thereon." If impracticable to so restore, then such areas are to be "appropriately posted or other safety measures will be undertaken * * *" The circular does *not* say that areas with known duds thereon should nevertheless be released to civilian use. In fact, it categorically declares that *"any* unexploded ammunition or duds which remain on these lands will render them *unfit* for civilian use unless the areas are *neutralized* to remove *any possible danger* to persons, animals, or personal property. * * * In the change of status of such areas or ranges from active to inactive or surplus, *persistent and continuous attention* will be given by the installation or tactical commander to

the examination and policing of such areas, to the end that they are *free* of *all* explosive material. * * * The responsible commander will ascertain that any area to be recommended as being no longer required is *free of any element* which may be dangerous to civilian occupany at a later date."

The Government actually has no right to argue this point because the defense is not pleaded. The court in *Boyce v. United States,* 93 Fed. Supp. 866 (Iowa), said:

> "Unless the pleadings show upon their face the applicability of the 'discretionary function' exception contained in Section 2680 (a), the same must be raised by way of an affirmative defense and the burden, therefore, devolves upon the Government to establish its applicability".
>
> (p. 868.)

In any event, appellant has misinterpreted the meaning of the words "discretionary function" as used in the Federal Tort Claims Act. Where the law gives a Government official the choice or discretion of pursuing or not pursuing a certain policy, the courts historically have refused to interfere with the exercise of such executive discretion. The Act preserves this historical immunity. But once the choice or discretion has been exercised, the chosen policy cannot be executed in a negligent, wrongful, or criminal manner.

Here, the War Department had a choice or discretion as to whether scrap metal on strafing ranges should or should not be sold for profit. Once having

decided to do so, the Government was then obligated to the business invitee performing the contract to the same extent as "a private person * * * in accordance with the law of the place where the act or omission occurred" (28 USCA, § 1346 (b)).

For example, in *Somerset Seafood Co. v. United States,* 193 Fed. (2d) 631 (4th Circ.), where the Government was held liable under the Federal Tort Claims Act for the negligent marking of a wrecked vessel, the Government argued that this was a "discretionary function" within Section 2680 (a) of the Act. The court rejected this argument and said:

> "Even if the decision to mark or remove the wreck be regarded as discretionary, there is liability for negligence in marking *after* the discretion has been exercised and the decision to mark has been made. There is certainly no discretion to mark a wreck in such a way as to constitute a trap for the ignorant or unwary rather than a warning of danger."
>
> (p. 635.)

Similarly, in *Costley v. United States,* 181 Fed. (2d) 723 (5th Circ.), where the Government was held liable for the negligent treatment of a sergeant's wife in an Army hospital, the court said that once the Government had exercised its discretion to admit the wife, it could not treat her in a negligent manner.

To the same effect, see: *Dishman v. United States,* 93 Fed. Supp. 567 (Md.), and *Toledo v. United States,* 95 Fed. Supp. 838 (Puerto Rico), one of the cases cited by appellant (Br. p. 18).

There is nothing to the contrary in any of the other cases cited by appellant (Br. p. 18). In *Kendrick v. United States,* 82 Fed. Supp. 430 (Ala.), the court very properly held that the Government was not liable because the Veterans Administration exercised its discretion strictly according to the regulations and released a veteran, who subsequently killed someone. *North v. United States,* 94 Fed. Supp. 824 (Utah), held that the Department of Interior was not liable for exercising its discretion by constructing a dam in accordance with law, merely because the dam *might* have interfered with the flow of underground waters under plaintiff's land. Similarly, *Coates v. United States,* 181 Fed. Rep. (2d) 816 (8th Circ.), held that the Government was not liable for exercising its discretion in accordance with the law by changing the course of the Missouri River pursuant to the Missouri River Control Program over a twenty-year period, even though this may have interfered with the water flow on plaintiff's land. *Old King Coal Co. v. United States,* 88 Fed. Supp. 124 (Iowa), was an action to recover for loss allegedly suffered by reason of a coal mine not being operated after it had been taken over by the Secretary of the Interior under Executive Order of the President. The court correctly held that the Secretary of the Interior had the discretion in the furtherance of the war effort to either operate or not to operate the mine under these circumstances.

When an Army installation is placed in the hands of Government officials, they have no "discretion" whether they shall maintain the same in a safe and

proper manner. If a business invitee is brought on the premises by the Government, certainly they have no "discretion" in respect to their duties to such invitee. If the law were otherwise, there could be no recovery in any case involving the negligent maintenance or operation of a military installation, however wanton, reckless, or criminal the conduct of Army personnel might be.

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(7) THE INDUSTRIAL INDEMNITY COMPANY, SUBROGEE, IS ENTITLED TO RECOGNITION OF ITS CLAIM OF LIEN.

On pages 28 and 29 of its brief, appellant argues that The Industrial Indemnity Company is not entitled to recognition of its claim of lien and supplemental claim of lien in the net amount of $3722.11 for medical, hospital and other expenditures made on behalf of White. Appellant says that *United States v. Aetna Casualty & Insurance Company,* 338 U.S. 366, 94 L. Ed. 171, 70 Sup. Ct. 207, held that an insurance carrier may not share in any judgment as subrogee under the Federal Claims Act unless it is a formal party plaintiff (Br. p. 28). This is incorrect. The *Aetna* case held for the first time that an insurance carrier was entitled to sue in its own name as a party plaintiff for the *entire* claim to which it was partially subrogated. The court also pointed out that the insured could likewise sue in his own name for all the damages, or that the Government could, if so disposed, compel joinder of both by timely motion, even though both are not "indispensable" parties. The case did *not* hold that an insurance carrier could not share in

a judgment in any way unless made a formal party plaintiff, nor was that an issue in the case.

There are other cogent reasons why the *Aetna* case is no authority here: The plaintiff in this case is not the insurance company but John Phillip White, the injured party. He brought suit for *all* damages sustained, including the medical and hospital expenses paid for him by The Industrial Indemnity Company (Br. pp. 46-51). During the trial, counsel for White advised the court that they likewise represented The Industrial Indemnity Company to the extent of its subrogated claim (Tr. p. 217). In respect to this claim, counsel for the Government stipulated that the medical and hospital payments were made by the insurance company on behalf of White and that they were reasonable in amount (Tr. pp. 222-223). The sole objection of the Government attorney at that time was stated by him as follows:

> "I do not think the court can award a judgment to Mr. White because he has not paid these bills * * *"
>
> (Tr. p. 219.)

In this respect, counsel was wrong, because it is clear that the injured party may sue for *all* damages, regardless of who pays the same:

United States v. Aetna Casualty & Insurance Company, supra;

United States v. State Road Department, 189 Fed. (2d) 591 (5th Circ.);

Gray v. United States, 77 Fed. Supp. 869 (Mass.).

Nevertheless, out of an abundance of caution and to meet this objection, a formal claim of lien was filed on behalf of The Industrial Indemnity Company, in accordance with California practice (Calif. Labor Code, § 3856), and White consented thereto by endorsement on the face of the claim (Tr. pp. 37-39; 220). The Government could have compelled the joinder of the insurance company as a party (*Aetna Casualty* case), but did not choose to do so.

When the case was reopened on the question of damages, the insurance carrier filed a supplemental claim of lien covering the stipulated (Tr. pp. 320-321) expenses paid for White since the original trial, and White again affixed his consent thereto (Tr. pp. 44-45). At this time, appellant's counsel waived all objections to this procedure, and stated:

> "*No objection,* with the supplemental claim of lien, Your Honor * * * I also advised the Court at the time they filed the original claim of lien, and I think the Court overruled me, *rather properly.* Outside of that, *I have no objection.*"
>
> (Tr. p. 321.)

The case was thereafter reopened for the purpose of assisting the court in the formulation of its judgment by the introduction in evidence of the letter of agreement between the insurance company, the insured, and their attorneys (Tr. pp. 56-58). Once again, the Government tendered no objection (Tr. pp. 353-355).

The District Court then proceeded to recognize the interest of the insurance company in its findings of fact (Tr. pp. 73-74) and in the preamble to its formal judgment (Tr. pp. 78-81), which judgment was approved as to form by the Government (Tr. p. 82). *But the judgment itself, to the extent of the total award of $55,081.19 was given to plaintiff John Phillip White, and to no one else* (Tr. p. 80). The attorneys and the insurance company were then recognized as to their respective interests in the judgment, in accordance with the consent of White (Tr. pp. 80-81).

The Federal Courts have similarly protected the interest of insurance companies *even where a formal claim of lien has not been filed.* In *Gray v. United States,* 77 Fed. Supp. 869 (Mass.), the court said that the insured party should recover the full amount, but should hold the insurance company's interest as trustee. In *Grace to the use of Grangers Mutual Insurance Co. v. United States,* 76 Fed. Supp. 174 (Md.), the court approved the use of the old equity practice established by *United States v. American Tobacco Co.,* 166 U.S. 468, 474, 17 Sup. Ct. 619, 41 L. Ed. 1081, by impressing the insurer's interest with a trust. In *Marino v. United States,* 84 Fed. Supp. 721 (N.Y.), the court awarded $20,000 damages to the injured plaintiff and suggested that "suitable provision be included" in the judgment to reimburse the insurer for the $5,029.62 expended on plaintiff's behalf.

In this case the trial court was clearly advised of the respective interests of the injured party and the insurance carrier-subrogee. These interests were formally made a part of the record of this case. The judgment does no more than provide for payment in accordance with these respective interests, as to which there was no dispute. By so doing, there was no conceivable prejudice to the Government, nor does appellant claim such prejudice on this appeal. The judgment, as entered, preserves the rights of all interested parties in one proceeding in a simple, practical and common-sense manner.

CONCLUSION.

In essence this is not a complicated case. We have the unfortunate situation where the owner or operator of land invites a business invitee on his premises for their mutual profit, represents the area as safe, fails to render the area safe or to properly inspect the same in order to ascertain potential danger, and neglects to give warning of the danger likely to be encountered. Under applicable California law which here governs, this is negligence. The situation is aggravated, not only because of the grievous injuries which resulted, but also because the Government had knowledge of the very danger encountered, but refused to eliminate the same for the reason that the potential cost was too great. The Federal Tort Claims Act makes the Government liable under applicable

local law wherever a private individual would be liable. Clearly, a private individual or corporation would be liable to a business invitee under the circumstances of this case.

Dated, San Francisco, California,
January 14, 1953.

Respectfully submitted,
LEONARD J. BLOOM,
M. S. HUBERMAN,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

Title 28 U.S.C.A. Section 1346 (b) reads as follows:

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Title 28 U.S.C.A. Section 2671 reads as follows:

"As used in the chapter and sections 1346 (b) and 2401 (b) of this title, the term—

'Federal agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and

persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982, amended May 24, 1949, c. 139, § 124, 63 Stat. 106."

Title 28 U.S.C.A. Section 2674 reads in part as follows:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

Title 28 U.S.C.A. Section 2680 reads in part as follows:

"The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."